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Luqman Hadi bin Mustapa v Public Prosecutor and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS M-05(M)-357–08 OF 2019 AND M-05(SH)-358–08 OF 2019
KAMALUDIN MD SAID, NORDIN HASSAN AND HASHIM HAMZAH JJCA

C

6 SEPTEMBER 2022

Criminal Law — Defence — Unsound mind — Whether defence of insanity under s 84 of Penal Code established

D

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant was convicted for offences under ss 302 and 307 of Penal Code — Whether defence of insanity under s 84 of Penal Code established — Whether prosecution complied with s 343(1) and (3) of Criminal Procedure Code — Criminal Procedure Code ss 182A(1), 343(1) & (3) — Penal Code ss 84, 85(2)(b), 302 & 307

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The appellant was charged with three counts of murder under s 302 of the Penal Code ('the PC') and two counts of attempt to commit murder under s 307 of the PC. The offences were committed by the appellant in a house located in the district of Melaka Tengah. Based on the evidence of one of the victims ('SP9'), during the incident, the appellant said to SP9 that he did the act out of revenge. After the incident, the appellant absconded from the house by driving SP9's car. The appellant was then found by the police in a toilet at the Al Falah Mosque. All the victims in this case suffered severe and multiple injuries including slash wounds on the neck and amputation of fingers. The High Court found that prima facie case was established and called the appellant to enter his defense. The appellant elected to remain silent and subsequently the defence called Dr Yeoh Chia Min ('SD1') to tender a psychiatric report dated 18 June 2017, prepared by the late Dr Badiah bt Yahya ('Dr Badiah'). SD1 admitted that he had no personal knowledge of the appellant's case. At the end of the case, the High Court found that the defence had failed to establish the defence of insanity provided under s 84 of the PC and as such the prosecution had proved its case against the appellant on all the charges beyond reasonable doubt. In the present appeal, the counsel for the appellant contended that the psychiatric report by Dr Badiah showed that the appellant suffered 'Substance-Induced Psychotic Disorder' due to prolong drugs consumption and Dr Badiah was of the view that the appellant was insane and did not know what he did at the material time was wrong in law. This was in

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effect a defence of insanity under s 84 of the PC but the counsel for the appellant in the present appeal relied on s 85(2)(b) of the PC. Aside from the defence of insanity, the appellant further submitted that the prosecution had failed to comply with s 343(1) and (3) of the Criminal Procedure Code ('the CPC').

Held, dismissing the appellant's appeals, and affirming the convictions and sentences by the High Court:

(1) Based on the evidence adduced by the prosecution and the credibility of witnesses, the trial judge found that the prosecution had proved a prima facie case against the appellant for all the charges. Thus, when the appellant remained silent with no evidence in rebuttal, it was perfectly correct for the trial judge to convict the appellant (see para 30).

(2) The court was also minded of the law that, at the conclusion of the trial, the trial judge must analyse all available evidence produced in the trial as required under s 182A(1) of the CPC. In the present case, the only evidence relied on by the defence was the psychiatric report by Dr Badiah. This report and the maker were not subject to any cross-examination as Dr Badiah had passed away before the trial and SD1 had no knowledge of the contents of the report. Dr Badiah's report alone was insufficient to prove legal insanity. Legal insanity meant that the appellant was incapable of knowing the nature of the act or he was incapable of knowing what he was doing was wrong or contrary to law. On this fact, the court agreed with the finding of the trial judge that the defence had failed to prove insanity on the balance of probabilities (see paras 31–32).

(3) Based on the evidence, when the appellant attacked SP9, he said to her that he did it out of revenge. The appellant also had attacked the male victims first and the attack was on the vital part of the victims' body. After the attack, the appellant absconded from the house and hid in a toilet at the Al Falah Mosque. Viewed in totality, the appellant's conduct showed that the appellant was conscious of what he did at the material time and knew that what he did was wrong and against the law. Further, the reasonable inference from the severe and multiple injuries inflicted on the victims was that they were inflicted by a person who was conscious of the act and intended to commit the act as well as to ensure his action was successful. The law provided that the absence of motive was an element that supported the defence of insanity but in the present case, the motive revealed by the appellant to SP9 was to take revenge against SP9's family. Hence, with a clear motive, together with the evidence alluded to earlier, the appellant's defence of legal insanity was bereft of any merit (see paras 35–38).

(4) Section 85(2)(b) of the PC required the appellant to prove that he was insane or temporarily insane due to intoxication and did not know what he did was wrong. Although the trial judge did not address s 85(2)(b) of the PC in his judgment, the fact remained that the appellant had failed to prove that he was insane or temporarily insane and did not know what he did was wrong. The court at the appellate stage was empowered to review and re-evaluate all the available evidence and decide on this issue although it was not canvased by the trial judge. In the present appeal, based on the available evidence, the court found that the appellant had failed to prove the statutory defence under ss 84 or 85(2)(b) of the PC on the balance of probabilities (see paras 40–42).

(5) In the present case, upon the application by the prosecution under s 342 of the CPC, the appellant was sent to Hospital Permai, Johor Bahru for observation as to his mental condition. Having examined and made observations on the appellant, Dr Badiah then prepared the appellant's psychiatric report dated 18 June 2017. In her report, Dr Badiah certified that the appellant was of sound mind and capable of making his defence. Dr Badiah's report was also tendered at the High Court and marked as P58. The appellant's plea was taken at the High Court on 22 October 2018 where he pleaded not guilty. Further, at the trial in the High Court, the appellant made his defence by raising the statutory defence of insanity. In the circumstances, there was no failure to comply with s 343(1) or (3) of the CPC. Further, there was no miscarriage of justice against the appellant or any prejudicial effect on the appellant on this issue. As such, the appellant's contention on this issue was untenable (see paras 46–49).

(6) Based on the above reasons, there was no appealable error by the High Court judge that warranted appellate intervention. The appellant's convictions for all the charges were safe (see para 50).

[Bahasa Malaysia summary

Perayu didakwa dengan tiga pertuduhan membunuh di bawah s 302 Kanun Keseksaan ('KK') dan dua pertuduhan percubaan untuk melakukan pembunuhan di bawah s 307 KK. Kesalahan-kesalahan tersebut dilakukan oleh perayu di sebuah rumah yang terletak di daerah Melaka Tengah. Berdasarkan keterangan salah seorang mangsa ('SP9'), semasa kejadian, perayu berkata kepada SP9 bahawa dia melakukan perbuatan tersebut untuk membalas dendam. Selepas kejadian tersebut, perayu melarikan diri dari rumah dengan memandu kereta milik SP9. Perayu kemudian ditemui oleh polis di dalam sebuah tandas di Masjid Al Falah. Kesemua mangsa dalam kes ini mengalami kecederaan parah dan pelbagai termasuk luka tetak di leher dan putus jari. Mahkamah Tinggi mendapati bahawa kes prima facie telah dibuktikan dan memanggil perayu untuk membela diri. Perayu memilih untuk berdiam diri dan seterusnya pihak pembelaan memanggil Dr Yeoh Chia Min

('SD1') untuk mengemukakan laporan psikiatri bertarikh 18 Jun 2017, yang disediakan oleh Allahyarham Dr Badiah bt Yahya ('Dr Badiah'). SD1 mengakui bahawa beliau tidak mempunyai pengetahuan peribadi tentang kes perayu. Pada akhir kes, Mahkamah Tinggi mendapati bahawa pihak pembelaan telah gagal untuk membuktikan pembelaan ketidaksempurnaan akal yang diperuntukkan di bawah s 84 KK dan oleh itu pihak pendakwaan telah membuktikan kesnya terhadap perayu atas semua pertuduhan melampaui keraguan munasabah. Dalam rayuan ini, peguam perayu berhujah bahawa laporan psikiatri oleh Dr Badiah menunjukkan perayu mengalami 'Substance-Induced Psychotic Disorder' akibat pengambilan dadah yang berpanjangan dan Dr Badiah berpendapat perayu tidak siuman dan tidak tahu apa yang dia lakukan pada masa yang material adalah salah di sisi undang-undang. Ini sebenarnya merupakan pembelaan ketidaksempurnaan akal di bawah s 84 KK tetapi peguam bagi perayu dalam rayuan semasa bergantung pada s 85(2)(b) KK. Selain daripada pembelaan ketidaksempurnaan akal, perayu seterusnya berhujah bahawa pihak pendakwaan telah gagal mematuhi s 343(1) dan (3) Kanun Tatacara Jenayah ('KTJ').

Diputuskan, menolak rayuan-rayuan perayu dan mengekalkan sabitan-sabitan dan hukuman-hukuman oleh Mahkamah Tinggi:

(1) Berdasarkan keterangan yang dikemukakan oleh pihak pendakwaan dan kredibiliti saksi-saksi, hakim bicara mendapati pihak pendakwaan telah membuktikan kes prima facie terhadap perayu bagi semua pertuduhan. Oleh itu, apabila perayu berdiam diri tanpa mengemukakan keterangan untuk menyangkal, adalah tepat bagi hakim bicara untuk mensabitkan perayu (lihat perenggan 30).

(2) Mahkamah juga mengambil kira undang-undang bahawa, pada akhir perbicaraan, hakim bicara mesti menganalisis semua keterangan yang ada yang dikemukakan dalam perbicaraan seperti yang dikehendaki di bawah s 182A(1) KTJ. Dalam kes ini, satu-satunya keterangan yang disandarkan oleh pihak pembelaan ialah laporan psikiatri oleh Dr Badiah. Laporan ini dan pembuatnya tidak tertakluk kepada apa-apa pemeriksaan balas kerana Dr Badiah telah meninggal dunia sebelum perbicaraan dan SD1 tidak mengetahui kandungan laporan tersebut. Laporan Dr Badiah sahaja tidak mencukupi untuk membuktikan ketidaksempurnaan akal menurut undang-undang. Ketidaksempurnaan akal menurut undang-undang bermaksud perayu tidak dapat mengetahui sifat perbuatan tersebut atau dia tidak berupaya untuk mengetahui apa yang dia lakukan adalah salah atau bertentangan dengan undang-undang. Atas fakta ini, mahkamah bersetuju dengan dapatan hakim bicara bahawa pihak pembelaan telah gagal membuktikan ketidaksempurnaan akal di atas imbangan kebarangkalian (lihat perenggan 31–32).

(3) Berdasarkan keterangan, apabila perayu menyerang SP9, dia berkata kepadanya bahawa dia melakukannya untuk membalas dendam. Perayu juga telah menyerang mangsa lelaki terlebih dahulu dan serangan tersebut dilakukan pada bahagian penting tubuh mangsa-mangsa. Selepas serangan tersebut, perayu melarikan diri dari rumah dan bersembunyi di dalam tandas di Masjid Al Falah. Jika dilihat secara keseluruhan, kelakuan perayu menunjukkan bahawa perayu sedar apa yang dia lakukan pada masa material dan tahu bahawa apa yang dia lakukan adalah salah dan bertentangan dengan undang-undang. Selanjutnya, kesimpulan munasabah daripada kecederaan teruk dan pelbagai yang dilakukan ke atas mangsa adalah bahawa ia telah dilakukan oleh seseorang yang sedar akan perbuatan tersebut dan berniat untuk melakukan perbuatan tersebut serta untuk memastikan tindakannya berjaya. Undang-undang memperuntukkan bahawa ketiadaan motif adalah elemen yang menyokong pembelaan ketidaksempurnaan akal tetapi dalam kes ini, motif yang didedahkan oleh perayu kepada SP9 adalah untuk membalas dendam terhadap keluarga SP9. Oleh itu, dengan motif yang jelas, bersama-sama dengan keterangan yang dirujuk sebelum ini, pembelaan ketidaksempurnaan akal menurut undang-undang yang dibangkitkan oleh perayu adalah tidak bermerit (lihat perenggan 35–38).

(4) Seksyen 85(2)(b) KK menghendaki perayu membuktikan bahawa dia tidak siuman atau tidak siuman buat sementara waktu kerana mabuk dan tidak tahu apa yang dia lakukan adalah salah. Walaupun hakim bicara tidak menyebut s 85(2)(b) KK dalam penghakimannya, fakta kekal bahawa perayu gagal membuktikan bahawa dia tidak siuman atau tidak siuman buat sementara waktu dan tidak tahu apa yang dia lakukan adalah salah. Mahkamah di peringkat rayuan diberi kuasa untuk menyemak dan menilai semula semua keterangan yang ada dan memutuskan isu ini walaupun ia tidak dikemukakan oleh hakim bicara. Dalam rayuan semasa, berdasarkan keterangan yang ada, mahkamah mendapati bahawa perayu telah gagal membuktikan pembelaan berkanun di bawah ss 84 atau 85(2)(b) KK di atas imbangan kebarangkalian (lihat perenggan 40–42).

(5) Dalam kes ini, atas permohonan oleh pihak pendakwaan di bawah s 342 KTJ, perayu telah dihantar ke Hospital Permai, Johor Bahru untuk pemerhatian tentang keadaan mentalnya. Setelah meneliti dan membuat pemerhatian ke atas perayu, Dr Badiah kemudiannya menyediakan laporan psikiatri perayu bertarikh 18 Jun 2017. Dalam laporannya, Dr Badiah memperakui perayu mempunyai fikiran yang waras dan mampu membuat pembelaan. Laporan Dr Badiah juga telah dikemukakan di Mahkamah Tinggi dan ditandakan sebagai P58. Pengakuan perayu telah dibuat di Mahkamah Tinggi pada 22 Oktober 2018 di mana dia mengaku tidak bersalah. Selanjutnya, pada perbicaraan

di Mahkamah Tinggi, perayu membuat pembelaannya dengan membangkitkan pembelaan berkanun ketidaksempurnaan akal. Dalam keadaan tersebut, tiada kegagalan untuk mematuhi s 343(1) atau (3) KTJ. Tambahan pula, tiada berlakunya kegagalan keadilan terhadap perayu atau apa-apa kesan prejudis terhadap perayu dalam isu ini. Oleh yang demikian, hujahan perayu mengenai isu ini tidak boleh dipertahankan (lihat perenggan 46–49).

(6) Berdasarkan alasan-alasan di atas, tiada kesilapan yang boleh dirayu oleh hakim Mahkamah Tinggi yang memerlukan campur tangan rayuan. Sabitan perayu untuk semua pertuduhan adalah selamat (lihat perenggan 50).]

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Chan Kwee Foong v PP [2010] 1 MLJ 441, CA (refd)
Goh Yoke v PP [1970] 1 MLJ 63, FC (refd)
John a/k Nyumbei v PP [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)
PP v Arokiasamy a/l Alphonso [2012] 1 MLJ 165; [2012] 6 CLJ 117, CA (refd
PP v Muhammad Suhaimi Abdul Aziz [2004] 1 CLJ 378, CA (refd)
PP v Misbah bin Saat [1997] 3 MLJ 495, HC (refd)
Rajagopal v PP [1977] 1 MLJ 6, FC (refd)
Yeo Ah Seong v PP [1967] 1 MLJ 231, FC (refd)

Legislation referred to

Criminal Procedure Code ss 182A(1), 342, 343(1), (3)
Evidence Act 1950 s 105
Penal Code ss 84, 85(2), 85(2)(b), 302, 307

Appeal from: Criminal Trial Nos MA-45B-03–10 of 2017 and MA-45B-04–10 of 2017 (High Court, Melaka)

Azrul Zulkifli Stork (with Mohd Fahmy b Mohd Sulaiman and Azalea Nazihah) (Azharudin & Assoc) for the appellant.
Nurul Farhana bt Kahlid (with Dhiya Syazwani Izyan bt Mohd Akhir) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Nordin Hassan JCA (delivering judgment of the court):

[1] The appellant, in this case, was convicted by the Malacca High Court for three counts of murder under s 302 of the Penal Code ('the PC') and two counts of attempt to commit murder under s 307 of the same Code. Consequently, the appellant was sentenced to death by hanging for both the offences of murder and ten years imprisonment each from the date of arrest, for

the offences of attempt to commit murder. The imprisonment sentence was to run concurrently.

[2] Aggrieved with the decision of the High Court, the appellant appealed against all the convictions and sentences imposed against the appellant.

[3] Having read the appeal records, the written submissions that were filed and after hearing the oral submissions by parties, we unanimously dismissed the appellant's appeal. We affirmed the decision of the High Court in convicting and sentencing the appellant for all the charges proffered against the appellant. Our decision is based on the following analysis and reasons.

THE PROSECUTION'S CASE

[4] The charges proffered by the prosecution against the appellant were as follows:

(a) Criminal Trial No MA-45B-03–10 of 2017:

(i) first charge (*pertuduhan pertama*):

> Bahawa kamu pada 25 Ogos 2016 antara jam 5.50 pagi hingga 6.15 pagi, di rumah No. 460-1, Jalan Sidang Said, KM7.2 Bertam Malim, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka, telah melakukan bunuh dengan menyebabkan kematian terhadap *Muhammad Taufeq bin Hassan* (No K/P: 941107-04-5431), dan oleh demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah *seksyen 302 Kanun Keseksaan*.

(ii) second charge (*pertuduhan kedua*):

> Bahawa kamu pada 25 Ogos 2016 antara jam 5.50 pagi hingga 6.15 pagi, di rumah No. 460-1, Jalan Sidang Said, KM7.2 Bertam Malim, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka, telah melakukan bunuh dengan menyebabkan kematian terhadap *Mariah binti Baharim* (No K/P: 551005-10-6260), dan oleh demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah *seksyen 302 Kanun Keseksaan*.

(iii) third charge (*pertuduhan ketiga*):

> Bahawa kamu pada 25 Ogos 2016 antara jam 5.50 pagi hingga 6.15 pagi, di rumah No. 460-1, Jalan Sidang Said, KM7.2 Bertam Malim, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka, telah melakukan bunuh dengan menyebabkan kematian terhadap *Hassan bin wahab* (No. K/P: 460801-01-5059), dan oleh demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah *seksyen 302 Kanun Keseksaan*.

(b) Criminal Trial No MA-45B-04–10 of 2017:

(i) first charge (*pertuduhan pertama*):

Bahawa kamu pada 25 Ogos 2016 antara jam 5.50 pagi hingga 6.15 pagi, di rumah No. 460-1, Jalan Sidang Said, KM7.2 Bertam Malim, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka, telah melakukan perbuatan yang boleh menyebabkan kecederaan kepada *Noor Haslinda Diyana binti Hassan* (No. K/P: 900921-04-5056), yang mana sekiranya perbuatan kamu itu menyebabkan kematian, maka kamu akan bersalah bagi kesalahan membunuh, dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah *seksyen 307 Kanun Keseksaan*.

(ii) second charge (*pertuduhan kedua*):

Bahawa kamu pada 25 Ogos 2016 antara jam 5.50 pagi hingga 6.15 pagi, di rumah No. 460-1, Jalan Sidang Said, KM7.2 Bertam Malim, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka, telah melakukan perbuatan yang boleh menyebabkan kecederaan kepada *Nur Aqedah Aeina binti Hassan* (No. K/P: 920731-04-5056), yang mana sekiranya perbuatan kamu itu menyebabkan kematian, maka kamu akan bersalah bagi kesalahan membunuh, dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah *seksyen 307 Kanun Keseksaan*. (Emphasis added.)

[5] The narrative of the prosecution's case begins with the fact that on 25 August 2016 at about 6.15am, SP2, the victims' neighbour heard a sound of a car reversing in a rush manner and asked her husband to have a look at it. Her husband then saw a white Myvi car belonging to her neighbor, Noor Haslinda Diyana bt Hassan (SP9), leaving the place at high speed towards Jalan Pulau Gadong.

[6] Thereafter, at about 6.40am, the neighbors heard someone shouting for help from the victims' house. The neighbors went to the said house and found that it was the house of Mariah bt Baharim, one of the deceased who was murdered in the house and the mother of SP9. Besides SP9 and her mother, the other occupants of the house were, SP9's sister, Nur Aqedah Aeina bt Hassan (SP10), SP9's father, Hassan bin A Wahab (deceased), SD9's younger brother, Muhammad Taufeq bin Hassan (deceased), SP9's bedridden grandmother, Siti Khatijah, and the appellant who was an adopted son of SP9's auntie, Mariana bt Baharim.

[7] SP9 was seen covered with blood and asking for help at the house. She was at the front door but the grill door was locked. One of the neighbours, SP5, noticed that there were injuries on her neck and her fingers were cut off. SP2 then call the police informing about the incident.

[8] Meanwhile, SP8, the cousin of Mariah, came to the house and saw SP9 covered with blood and asked her who did this to her and SP9 answered that it was the appellant who did it. SP8 then took the key that was hanging near the

door and opened the grill door. SP8 then proceeded to a room where SP9, her mother, sister, and grandmother sleep and found that SP10 was injured, Mariah was not responding when SP8 called her but Siti Khatijah was unharmed. Siti Khatijah then told SP8 that the appellant did all this.

[9] Next, SP8 went to the hall and saw Muhammad Taufeq's body covered with blood with a severe injury on his neck. There was no response from Muhammad Taufeq when SP8 called his name. SP8 presumed that he was dead then.

[10] SP9, SP10, and Siti Khatijah were later taken to the hospital for treatments.

[11] On the same day, 25 August 2016, at about 12.05pm, the appellant was arrested while hiding in a toilet at Al-Falah Mosque by ASP Balan a/l Annamalai (SP11) and his team. The appellant refused to open the toilet's door and the police had to break open the door. SP11 then confiscated a beg from the appellant which contained among others, the appellant's clothing, a knife, a car key, and a wallet that contained the appellant's Maybank card, BSN Matrix card, and identity card. The appellant then showed SP11 the white Myvi car registration number MCG 2754 belonging to SP9 that was parked at the mosque. The appellant also admitted that he drove the car to the mosque.

[12] post mortems were conducted on the deceased, Hassan bin A Wahab, Mariah bt Ibrahim, and Muhammad Taufeq bin Hassan and the causes of death as reported in the post mortem reports are as follows:

(a) Hassan bin A Wahab — slash wounds on the neck;

(b) Mariah bt Ibrahim — slash wounds on the neck; and

(c) Muhammad Taufeq bin Hassan — multiple slash wounds.

[13] As for SP9, the injuries suffered by her as reported in the medical report (P48) are as follows:

(a) near-total amputation of the right thumb, index, middle, and ring fingers at the level of metacarpal bones;

(b) total amputation of the left thumb and index finger at the level of metacarpal bones;

(c) multiple facial bone fractures;

(d) left frontal laceration wound;

(e) multiple scalp laceration wounds;

(f) deep laceration wound on the left ear extending to the neck;

(g) deep laceration wound of the left chin;

(h) fracture of mandible;

(i) multiple skull bones fractures; and

(j) left scapula fracture.

[14] Next, the medical report (P49) of SP10 revealed that she suffered degloving injuries over the face, extending from the nose until the right ear (20cm) with right facial nerve palsy.

[15] During the trial, SP9 testified, inter alia, that on 24 August 2016 at about 10.20pm, SP9 went to meet his future fiancée at Tanjung Keling. She left the house driving her Myvi car, registration no MCG 2754. She came back to the house on 25 August 2016 at about 1.35am. At that time, she saw her brother, Muhammad Taufeq sleeping on a mattress in the hall. She then entered her room where she noticed SP10, her mother, and her grandmother were asleep. She then went to sleep but a few hours later her mother asked her what was the noise in front of the television which was in the hall. Suddenly, the appellant entered the room and attacked SP9, SP10, and their mother. While attacking SP9, the appellant said 'maafkan aku, aku buat macam ni sebab aku berdendam dari kecik'. After the attack, SP9 went out of the room and later found that her father, Hassan bin Wahab in another room was motionless.

[16] SP10 corroborated SP9 evidence and further testify that she was attacked by the appellant with a parang when she was in the room together with SP9, her mother, Mariah bt Baharim, and her grandmother, Siti Khatijah. Just before the attack, she heard a loud scream from her father in the other room.

THE FINDINGS OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION CASE

[17] Having assessed the evidence adduced by the prosecution on the maximum evaluation, the trial judge found that the prosecution had proved a prima facie case against the appellant for all five charges. Therefore, the appellant was asked to enter his defence on all the charges.

THE DEFENCE

[18] In this case, the appellant elected to remain silent, and thereafter the defence called a witness Dr Yeoh Chia Min (SD1) to tender a psychiatric report dated 18 June 2017, prepared by Dr Badiah bt Yahya, the then Director of

Hospital Permai, Johor Bahru, who had passed away. During cross-examination of SD1, he admitted that he has no personal knowledge of the appellant's case.

[19] The appellant's defence is insanity based on the psychiatric report by Dr Badiah bt Yahya.

THE DECISION OF THE TRIAL JUDGE AT THE END OF THE CASE.

[20] The trial judge decided at the end of the case, that based on the available evidence, the defence had failed to establish the defence of insanity provided under s 84 of the Penal Code and as such the prosecution had proved its case against the appellant on all the charges beyond a reasonable doubt.

THE APPEAL

[21] Counsel for the appellant submitted that the psychiatric report by Dr Badiah showed that the appellant suffered 'Substance-Induced Psychotic Disorder' due to prolong drugs consumption and Dr Badiah was of the view that the appellant was insane and did not know what he did at the material time was wrong in law. This, we viewed as a defence of insanity under s 84 of the Penal Code.

[22] However, counsel for the appellant was relying on s 85(2)(b) of the Penal Code which we will deal with in this judgment.

[23] To begin with, s 84 of the Penal Code states as follows:

> *Nothing is an offence* which is done by a person who, *at the time of doing it, by reason of unsoundness of mind*, is *incapable of knowing the nature of the act*, or *that he is doing what is either wrong or contrary to law*. (Emphasis added.)

[24] Here, it is trite law that the appellant must establish legal insanity as prescribed under s 84 of the Penal Code to exonerate the appellant from all the offences charged against him. This is consistent with the principle of law that intention or mens rea is an element that needs to be proved directly or indirectly to establish an offence.

[25] It is also trite law that the burden shouldered by the defence to prove legal insanity is on the balance of probabilities.

(See s 105 of the Evidence Act 1950, *Goh Yoke v Public Prosecutor* [1970] 1 MLJ 63 (FC), *Rajagopal v Public Prosecutor* [1977] 1 MLJ 6 (FC).)

[26] The legal defence under s 84 requires the defence to prove that because

of the unsoundness of mind, the accused is incapable of knowing the nature of the accused act or his action is wrong or contrary to the law at the time of committing the act. This legal insanity is for the court to decide but surely the medical evidence and other relevant evidence need to be considered. In this regard, the antecedents and the subsequent conduct of the accused are also relevant to show the state of mind of the accused at the time of committing the act.

[27] This court in the case of *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509 succinctly explained the issue of legal insanity in the following manner:

> 12. Thus, under s 84 Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.
>
> 13. There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes* (25 Ed) p 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378:
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> > It is settled law that the defence of insanity under s 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v Zainal Abidin bin Mat Zaid* [1993] 1 CLJ 147;*Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495.
>
> 14. When the defence of insanity is raised the court thus needs to consider two matters, namely:
>
> (i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and
>
> (ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie, that the accused was incapable of knowing the nature of his act as being wrong or against the law (see *Ratanlal and Dhirajlal's Law of Crimes*, (5th Ed) p 289). (Emphasis added.)

[28] Reverting to the present case, the starting point here is that the appellant had elected to remain silent when he was called to enter his defence. The appellant had taken the position not to provide any evidence especially, to prove his defence of legal insanity which the law requires, on the balance of probabilities. At this juncture, it is relevant to recapitulate the settled principle

of law that at the end of the prosecution case, the prosecution must establish a prima facie case by adducing evidence that can be overthrown by evidence in rebuttal. Therefore, if the accused chose to remain silent which entails no evidence in rebuttal, the accused must be convicted.

[29] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, the Federal Court explained as follows:

> 21. Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case while s 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase ' prima facie case' in s 180. Section 180(2) provides that the court shall record an order of acquittal if a prima facie case has not been made out while s 180(3) provides that if a prima facie case has been made out the accused shall be called upon to enter his defence. A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* (11th Ed) as:
>
> > *A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.*
>
> 22. The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. *Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus, if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out.* This must, as of necessity, require a consideration of the existence of any

reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case. (Emphasis added.)

[30] Coming back to the present case, based on the evidence adduced by the prosecution and the credibility of witnesses, the trial judge found that the prosecution had proved a prima facie case against the appellant for all the charges. Thus, when the appellant remains silent with no evidence in rebuttal, it is perfectly correct for the trial judge to convict the appellant.

[31] We are also minded of the law that, at the conclusion of the trial, the trial judge must analyze all available evidence produced in the trial as required under s 182A(1) of the Criminal Procedure Code ('the CPC') which states:

182A (1) At the conclusion of the trial, the Court *shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.*(Emphasis added.)

[32] In this case, the only piece of evidence available hinges on by the defence is the psychiatric report by Dr Badiah. This report and the maker were not subject to any cross-examination as Dr Badiah had passed away before the trial and SD1 has no knowledge of the contents of the report. Dr Badiah's report alone, we find, was insufficient to prove legal insanity. Legal insanity here as alluded to earlier is that the appellant was incapable of knowing the nature of the act or he was incapable of knowing what he was doing was wrong or contrary to law. On this fact, we agree with the finding of the trial judge that the defence had failed to prove insanity on the balance of probabilities.

[33] In this regard, Visu Sinnadurai J in *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495 said this:

The mere fact that the court has cognizance of a medical report to indicate that at the time of the commission of the offence the accused was of unsound mind is irrelevant at the stage when the accused is certified fit to stand trial and he chooses to plead guilty. *In any case, for purposes of establishing insanity as a defence, the medical report by itself is insufficient. It should be emphasized that for purposes of s 84 of the Code, what needs to be established is legal insanity and not mere medical insanity. Besides establishing that the accused was of unsound mind at the time he committed the offence, he needs to go further to establish that either: (a) he was incapable of knowing the nature of the act; or (b) that he was incapable of knowing what he was doing was wrong or contrary to law*. As to some of the difficulties which arise in the application of s 84, see the comprehensive article by Dr JK Canagarayar, Senior Lecturer at the Faculty of Law, National University of Singapore entitled, '*The Plea of Insanity: Some Observations on the Application of the 'Wrong or Contrary to Law' Test in Singapore, Malaysia and India*' [1985] 2 MLJ iii. I would also like to highlight the following observations made by the learned writer (at p ix) (Emphasis added.)

[34] Be that as it may, the evidence before the court, in particular, the antecedent and subsequent conduct of the appellant did not support the contention that the appellant was insane or temporarily insane, and not knowing what he did was wrong in law.

[35] Evidence revealed that when the appellant attacked SP9, he said to her that he did it out of revenge ('maafkan aku, aku buat macam ni sebab aku berdendam dari kecik'). The appellant also attacked the male victims first, that is SP9's father and brother before he attacked SP9, SP10, and their mother. The attack was also on the vital part of the victim's body, in particular, the neck. After the attack, the appellant absconded from the house driving the car belonging to SP9. The appellant then hid in a toilet at the Al Falah Mosque and refused to open its door when asked by the police which resulted in the police breaking open the said door. The appellant also showed the police the Myvi car that he parked at the mosque.

[36] Viewed in totality, the appellant's conduct shows that the appellant was conscious of what he did at the material time and knew that what he did was wrong and against the law. Here, we find the appellant's conduct supports the finding of the trial judge that the appellant was not insane when committing the act of murder and intended to commit murder.

[37] Further, the severe and multiple injuries suffered by all the victims as stated in the post mortems and medical reports, do not support the contention that they were done by someone who did not know the nature of the act. The reasonable inference from the injuries inflicted on the victims was that they were inflicted by a person who was conscious of the act and intended to commit the act as well as to ensure his action was successful (see *Public Prosecutor v Arokiasamy a/l Alphonso* [2012] 1 MLJ 165; [2012] 6 CLJ 117).

[38] Authorities seem to suggest that the absence of motive is an element that supports the defence of insanity (see *Yeo Ah Seng v Public Prosecutor* [1967] 1 MLJ 231; *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378). However, in the present case, the motive revealed by the appellant to SP9 is to take revenge against SP9's family. Hence, with a clear motive, together with the evidence alluded to earlier, the appellant's defence of legal insanity is bereft of any merit. Again, we reiterated here that there is no evidence by the defence that the appellant was insane at the material time and did not know what he did was wrong at the material time when the appellant elected to remain silent and Dr Badiah's psychiatric report was not substantiated.

[39] Counsel for the appellant further submitted that the trial judge failed to consider the defence under s 85(2)(b) of the Penal Code which states:

85 (1) Save as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) *the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission*. (Emphasis added.)

[40] Section 85(2)(b) mentioned above, also requires the appellant to prove that he was insane or temporarily insane due to intoxication and did not know what he did was wrong. This, the appellant had failed to prove as discussed above. In *Chan Kwee Foong v Public Prosecutor* [2010] 1 MLJ 441, this court takes the stand that the concept of insanity under s 85(2)(b) is identical to 'unsoundness of mind' under s 84. This is what was said:

[93] Clauses (a) and (b) of s 85(2) of the Penal Code share the same requirement and that would be that the intoxicated condition must have caused the accused not to know that the conduct was wrong or what he was doing. *It is to be noted that the concept of 'insanity' appearing in* s 85(2)(b) of the Penal Code is identical to 'unsoundness of mind' under s 84 of the Penal Code. (Emphasis added.)

[41] In this regard, although the trial judge did not address s 85(2)(b) in his judgment, the fact remains that the appellant had failed to prove that he was insane or temporarily insane and did not know what he did was wrong. We at the appellate stage are empowered to review and re-evaluate all the available evidence and decide on this issue although it was not canvased by the trial judge. The Federal Court in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 explained this as follows:

I am of the view that the *Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in the position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings*. In a case involving purely question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct (see *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122.

(See also *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579).

[42] Based on the available evidence, we find the appellant had failed to prove the statutory defence under s 84 or s 85(2)(b) of the Penal Code on the balance of probabilities.

A ANOTHER ISSUE RAISED BY THE APPELLANT

The non-compliance with s 343(1) and 343(3) of the CPC

B **[43]** On this issue, counsel for the appellant submitted that on 4 July 2017 when the appellant was brought before the Magistrate for mention of the appellant's case, the prosecution had failed to inform the Magistrate that a psychiatric report dated 18 June 2017 from Dr Badiah had already been obtained. The prosecution also had failed to tender the report as an exhibit in the magistrate court. This, counsel for the appellant contended in breach of ss 343(1) and 343(3) of the CPC.

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[44] For ease of reference, the relevant provisions are as follows:

D 343 (1) If the Medical Superintendent shall certify that the accused person is of sound mind and capable of making his defence the Judge or Magistrate shall proceed with the trial.

(2) If the Medical Superintendent shall certify that that person is of unsound mind and incapable of making his defence the Court shall, if satisfied of the fact, find accordingly, and thereupon the trial shall be postponed.

E

(3) The certificate of the Medical Superintendent shall be receivable as evidence under this section.

F **[45]** The above provisions are equally applicable in a trial before the subordinate courts as well as the High Courts.

[46] In the present case, upon the application by the prosecution under s 342 of the CPC, the appellant was sent to Hospital Permai, Johor Bahru for observation as to his mental condition. Having examined and made observations on the appellant, Dr Badiah then prepared the appellant's psychiatric report dated 18 June 2017. In her report, Dr Badiah certified that the appellant is of sound mind and capable of making his defence. At para 4 of her report it states as follows:

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H 4. Keadaan mental penama adalah stabil dan penama adalah layak untuk dibicarakan dan layak untuk memberi pengakuan di Mahkamah bagi tujuan pembelaan diri pada Tarikh laporan ini di tulis.

[47] Dr Badiah's report was also tendered at the High Court and marked as I P58.

[48] The appellant's plea was taken at the High Court on 22 October 2018 where he pleaded not guilty. In the notes of proceedings of the trial on p 3 of *Jld* 2(1), it states as follows:

Pertuduhan dibacakan, tertuduh faham dan minta dibicarakan.

Further, at the trial in the High Court, the appellant made his defence by raising the statutory defence of insanity.

[49] In the circumstances, we do not find any non-compliance with s 343(1) or 343(3) of the CPC. Further, there is no miscarriage of justice against the appellant or any prejudicial effect on the appellant on this issue. As such, the counsel for the appellant's contention on this issue is untenable.

CONCLUSION

[50] Based on the aforesaid reasons, it is our unanimous decision that there is no appealable error by the High Court judge that warrants our intervention. The appellant's convictions for all the charges are safe. Thus, the appellant's appeal is dismissed and the High Court decisions on convictions and sentences are affirmed.

Appellant's appeals dismissed; High Court's convictions and sentences affirmed.

Reported by Dzulqarnain bin Ab Fatar